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CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE, ET AL., Appellants,

VS.

STATE TAX COMMISSION,
STATE OF MISSISSIPPI, Appellees.

BRIEF FOR APPELLEES.

GREEK L. RICE, Attorney General, and
J. A. LAUDERDALE, Assistant Att'y. General,
Attorneys for Appellees

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The State Tax Commission of the State of Mississippi assessed S. B. Lawrence, a resident citizen of the State of Mississippi, with certain income taxes for the taxable year 1929, under the provisions of Chapter 132, Laws of 1924, as amended by Chapter 32, Extraordinary Session of 1928. Feeling aggrieved at this assessment, Lawrence appealed to the Chancery Court of the First Judicial District of Hinds County, as provided by law. The cause was tried in said Court on the original petition filed by the tax payer

and demurrer thereto. The Court overruled the demurrer; whereupon, the tax payer, Lawrence, refused to plead further, and a decree was entered against Lawrence and in favor of the State in the amount of the taxes as assessed by the State Tax Commission.

Whereupon, Lawrence prosecuted an appeal to the Supreme Court of Mississippi. The decree of the Chancery Court was affirmed, and Lawrence then prosecuted an appeal to this Court.

STATEMENT OF FACT.

The facts as reflected by the original petition in this case, and as aptly stated by Judge Ethridge in rendering the opinion of the Supreme Court of Mississippi, are as follows:

"S. B. Lawrence, the appellant, is a resident of Hinds County, Mississippi, engaged in constructing and maintaining public roads and highways in the State of Mississippi and in other states. In the year 1929 he went into the State of Tennessee, entered into and completed contracts for the construction of certain highways, which contracts were entered into and entirely completed in the state of Tennessee. He collected from that state the money accruing to him by reason of the performance of said contracts. His net income was such that, if his income earned and collected entirely beyond the limits of the State of Mississippi, in the State of Tennessee, were subject to taxation he would be owing the State of Mississippi the sum of $2,288.31." See record pages 1 to 10, inclusive, and page 20.

STATUTES IN CONTROVERSY.

Chapter 132, Laws of 1924, levied a general income tax and provided for the collection thereof. Section 11 of said Chapter defined the words "gross income." Said Section 11 was amended by Chapter 32, Laws of Extraordinary Session of 1928.

That part of said statutes necessary for the determination of the questions involved in this lawsuit, is as follows:

"Sec. 11. That for the purpose of this act, except as otherwise provided for non-residents, the term gross income—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal growing out of the ownership or the use of any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit or gains or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which, received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received.

"(b) The term gross income, does not in-

clude the folowing items which shall be exempt from taxation under this act:

"(1) * * * *
"(2) * * * *
"(3) * * * *
"(4) * * * *
"(5) * * * *
"(6) * * * *
"(7) * * * *

"(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay a tax pursuant to this act, or dividends from a national bank or state bank organized under the laws of the state of Mississippi."

"(9) * * * *
"(10) * * * *

Chapter 32, Laws Extraordinary Session of 1928 amended said Section 11 by adding after sub-section 10, sub-section 11, which is as follows:

"(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising." See Appendix I Appellants Brief.

QUESTIONS INVOLVED.

The questions involved in this case are as follows:

1. *Whether under the Constitution of the United States and the Constitution of Mississippi the State of Mississippi may levy and collect an income tax on an in-*

come earned beyond the borders of said state, by a resident citizen of the State.

2. *Whether Section 11, Chapter 132, Laws of 1924, as amended by Chapter 32, Laws Extraordinary Session of 1928, contravenes any provision of the Constitution of the United States or of the State of Mississippi.*

BRIEF AND ARGUMENT.

The argument for appellees will be presented under the same *points* and *sub-headings* as are used by counsel for appellant in his original brief.

B, C AND D.

There is no controversy in reference to the matters and things stated and the law cited in the brief for appellant under the sub-headings designated in the brief for appellant as B, C, and D, except that on page 4 of said brief appellant states as follows: "That for the purpose of entering into said contracts and performing the same, he adopted a situs in the State of Tennessee." It is shown by the record that appellant was a resident citizen of the State of Mississippi. Record 1, 3, 11, 12 and 20. On page 8 of the record, as a part of the petition filed in the Chancery Court, the following statement appears: "That under Chapter 32, as aforesaid, this petitioner became and was adjudicated to be liable for taxes on income thus earned and collected out of *the State of Mississippi where he maintains a business situs.*" It appears then from the record that appellant maintained his "business situs" within the

State of Mississippi, and that he was a resident citizen of the State of Mississippi.

E.

POINT I.

"The statute of the State of Mississippi complained of violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law, in that the Statute, as construed and enforced in this case, imposed liability upon the appellant for an excise, occupation or privilege tax on income contracted for and earned in following an occupation wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee. Consistent with the Fourteenth Amendment to the Constitution of the United States, a State may not tax persons, property or an occupation, or the income earned therefrom, beyond the limits of the state."

"(a) *The tax imposed upon Lawrence, the appellant, is an excise and not a property tax."*

Appellees concede that the tax imposed on Lawrence, the appellant, is an excise and not a property tax.

In my opinion, this proposition determines the other questions involved in this case, for the distinguishing feature in the cases relied upon by counsel for appellant and counsel for appellee is: In those cases relied upon by appellant the Courts hold that the tax therein referred to is a

property tax, and, therefore, a state is without authority to levy and collect a tax on property with a legal situs in another state; in those cases relied upon by appellees the Courts hold that where the tax is not a property tax but is an excise tax, an income tax may be levied even though the income is earned by the taxpayer beyond the confines of the State.

> "(b) *The State of Mississippi is without authority to levy an excise tax on income earned beyond the borders of the State.*"

In the case of *Hattiesburg Grocery Company v. Robertson*, 126 Miss., 34, 88 So., 4, involving the constitutionality of Chapter 101, Laws of 1912, the court held that the income tax imposed by the State of Mississippi possesses some of the elements both, of a tax on property and of a tax on persons, but that it cannot be strictly classified as a tax on either, because it is generally and necessarily an excise tax, and that in its last analysis, it is simply a portion of the taxpayer's net income appropriated by the state in consideration of the rights and protection granted by it to the taxpayer, Smith, C. J., speaking for the court, said:

> "Income is necessarily the product of the joint efforts of the State and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive and enjoy, and a tax, therefore, in the last analysis is simply a portion cut from the income and appropriated by the state as its share thereof, and while the tax on income includes some of the elements both of a tax on property and of a tax on persons, it cannot be classified as strictly a tax on either,

for it is generically and necessarily an excise, and should be enforced as such."

In the case of *State v. G. M. & N. R. R. Company*, 138 Miss., 70, 104 So., 689 where the same questions were raised with reference to Chapter 132, Laws of 1924, the court adhering to the doctrine announced in the Hattiesburg Case re-iterated that the Mississippi income tax is an excise and not a property tax. Smith, C. J., again speaking for the court said:

> "This contention is ruled by *Hattiesburg Grocery Company v. Robertson*, 126 Miss., 34, 88 So., 4, 25 A. L. R. 748, wherein this court after mature consideration held that a tax on income is an excise and is not a tax on the property from which the income may have been derived. As was there pointed out, a tax on income from property includes some of the elements both of a tax on property and a tax on persons and cannot be classified as strictly a tax on either alone. Property of itself alone cannot produce income but must be used or dealt with in some way by a person before gain or income can be derived therefrom, and no definition of income, though derived from property, can be framed which does not include the activities of the person by whom it was produced, received, or enjoyed."

With reference to the contention made by the appellee in the above styled case that the law conflicted with the commerce clause of the Federal Constitution, the court said:

> "The income of the G. M. & N. R. R. Company is derived from both inter and intrastate com-

merce and its contention is that a tax by the state on that portion of its income derived from interstate commerce is a burden on such commerce within the meaning of this clause of the Federal Constitution. If the tax were on gross income, a serious question would be here presented, but it is not on gross but on net income, and a tax on net income derived in whole or in part from interstate commerce is not a burden thereon within the meaning of this clause of the Federal Constitution as pointed out by the Supreme Court of the United States in *Glue Company v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 46, 65 L. Ed. 169; *Shaffer v. Carter*, 252 U. S. 36, 40 Sup. Ct. 221, 64 L. Ed. 445; *Atlantic Coast Line Railroad Company v. Daughton*, 262 U. S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051."

The brief for the appellee in the above styled cause shows that the very principle here contended for by the appellant was brought to the attention of the court on page 82 of the Mississippi Reports in the brief for the appellee where the following appears:

"An excise tax cannot be given extra-territorial effect. 26 R. C. L. 295. If this be an excise tax then it cannot be imposed upon the performance of an act, or the enjoyment of a privilege exercised in Alabama or Tenessee. That a state cannot impose an excise tax upon an act or privilege done or had beyond its own boundries is so apparent as to need no citation of authority. When the state treats this tax as an excise for one purpose, it must do so for all purposes. To say that it

is an excise tax when attacked on the ground of its violation of Section 112, but to all other intents and purposes is to be treated and dealt with as a property tax is to admit that it partakes more of the nature of a property than of an excise tax."

In overruling the foregoing contention, the court said:

> "As to the extra-territorial effect of the act: the tax imposed on residents of the state and on domestic corporation is on the whole of their income derived from business within or without the state, and the contention is that the tax is void in so far as it covers income derived from business without the state. The question here presented was ruled against the appellees by the Supreme Court of the United States in *McGuire v. Trefry*, 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739, and *Shaffer vs. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445."

Before proceeding to an examination of the cases cited by the appellant in his brief, we call attention to the fact that in the present case the question of the state's power to tax property situated in another state is not involved. Of course, we admit that the State of Mississippi has no right to levy a tax on real estate situated within another state, nor is the question of taxation by the state of intangible personal property located in another state involved here under the legal fiction of *mobilia sequuntur personam*. So far as the present record is concerned, Mr. Lawrence had no property, either in the State of Mississippi, or in the State of Tennessee. It is true that the fulfillment of the contract required the use of certain teams, road machinery and other equipment, but for all this record shows this

might have been rented by Mr. Lawrence or might have been the property of a sub-contractor. The case, therefore, does not concern the taxation of real property, tangible or intangible personal property, but is confined to the sole question whether the income tax levied on a resident indidual may be measured by the entire net income derived from sources without the state.

All the cases cited by appellant involve in some form or other the taxation of persons or property outside of the jurisdiction of the state, or intangible personal property actually situated in another state, but theoretically having a legal status in the state of the owner's domicile.

In the case of *Frick v. Commonwealth*, 268 U. S. 473, 69 L. Ed. 1058, the state of Pennsylvania attempted to levy an excise tax on certain property in foreign jurisdictions which was owned by the decedent at the time of his death. The court held that in effect this was an attempt on the part of the State of Pennsylvania to levy a tax on real property situated in another state and was, therefore, violative of the Fourteenth Amendment of the Federal Constitution.

In the case of *Farmers Loan and Trust Company v. State of Minnesota*, 280 U. S. 204, 74 L. Ed. 371, a resident of the State of New York owned certain certificates issued by the State of Minnesota. The owner died in New York, and the State of Minnesota levied an excise tax. Here too, the Supreme Court held that the State of Minnesota was without power to tax the property because it was situated in a foreign jurisdiction.

We submit that neither of the foregoing cases decided the question here involved, for the reason that the State of Mississippi is not attempting to tax the property of Mr. Lawrence in any manner whatsoever. Our income tax law levies an excise tax and not a property tax. Furthermore, this case does not present one where the State of Mississippi is attempting to levy an excise tax, the amount of which is measured by real or personal property located in another state.

In the case of *Safe Deposit and Trust Company v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, the taxing authorities of Virginia, levied a property tax upon a certain trust fund in the possession of the *Safe Deposit and Trust Company of Baltimore, Maryland.* The sole question decided by the court was whether the State of Virginia had the authority to levy a property tax upon the assets of the trust fund. The Supreme Court held that such authority did not exist. The opinion of the court shows that the tax was levied upon the whole corpus of the trust estate.

The case of *Fidelity Trust Company v. Louisville*, 245 U. S. 54, 62 L. Ed. 145 seems to support the contention of the appellee. In that case the City of Louisville, Kentucky sought to recover annual taxes for certain years on personal property omitted from the original assessment. The facts in the case were that L. P. Ewald was domiciled in Louisville but continued to carry on business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks subject to Ewald's order alone. They were

not used in the business and belonged absolutely to him. The court stated that the question presented was whether the funds could be taken into account in determining the amount of his Louisville tax. Mr. Justice Holmes delivering the opinion for the court said:

> "The present tax is a tax upon the person as is shown by the form of the suit and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared to be unlawful by authority, we see nothing to hinder the state from taking a man's credit into account. But so far from being declared unlawful, it has been decided by this court that whether a state shall measure the contribution by the value of such credits and chooses in action not exempt by superior authority is the state's affair not to be interfered with by the United States, and, therefore, that a state may tax a man for a debt due from a resident of another state."

It will be noted that inasmuch as the Supreme Court declared the Kentucky statute to impose a tax upon the person and not a tax upon the property, the situs of the property was immaterial.

The case of *McGuire v. Trefry*, 253 U. S. 12, 64 L. Ed. 738, cited by the Supreme Court of Mississippi in the case of *State v. G. M. & N. R. R. Company*, supra, involved the validity of the tax imposed by the State of Massachusetts on a trust fund held in the State of Pensylvania. The court

therein, speaking through Mr. Justice Day, said:

> "The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. The case presents no difference in principle from the taxation of credits evidenced by the obligations of the person who are outside of the state, which are held taxable at the domicile of the owner."

It is true that the State of Massachusetts has construed the income tax law of that state to be a property tax rather than an excise tax, but we submit that this fact would not affect the constitutionality of the tax. The Supreme Court of the United States has repeatedly announced the doctrine that it will consider the effect of a tax, rather than the mere name by which it is called. In the case of *Shaw v. Carter*, 252 U. S. 37; 40 Sup. Ct. 221; 64 L. Ed. 445, it was insisted that the income tax imposed was a personal tax as to resident citizens, and that it was a property tax with reference to non-residents. Mr. Justice Pitney in answering the contentions said:

> "This argument upon analysis resolves itself into a mere question of definitions and has no legitimate bearing upon any question, raised under the Federal Constitution, for where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, con-

struction, or definition, but upon the practical operation and effect of the tax imposed."

In the case of *Underwood Typewriter Company v. Chamberlain*, 254, U. S. 113, 65 L. Ed. 165, the question was raised whether the tax imposed was an excise tax to be measured by income, or direct tax upon that income. Mr. Justice Brandies quoted with approval the ruling in the Shaffer Case and held that the argument resolved itself into a mere question of definition and had no legitimate bearing upon any question raised under the Federal Constitution.

We, therefore, submit that the authorities show that the doctrine of *mobilia secuuntur personam* is immaterial in so far as the constitutionality of the tax is concerned. A tax which in effect is upon property outside of the jurisdiction of the state cannot be validated by resorting to this legal fiction. On the other hand, a tax which is levied upon a person residing in a certain jurisdiction will not be invalidated under the decision in the Shaffer Case and in the Fidelity Trust Company Case on the ground that the property is located in a foreign jurisdiction.

In the case of *Anderson v. Savage*, 139 N. E. 496; 245 Mass. 174, complainant was an inhabitant of the State of New York from January 1st, 1920 to May 16th, 1920 where he was employed by a Delaware Corporation which had its principal place of business in New York City. Complianant received a yearly salary of $5,000.00 payable monthly. The corporation moved its office to Boston on May 17th, 1920, complainant also moving to Boston and continuing his employment with the company. In making his return

he included his entire salary for the year, about five or six months of which had been earned while he was a citizen of New York. He thereafter made application for abatement, which was denied. Complainant relied upon the case of *Hart v. Tax Commission*, 240 Mass., 37; 132 N. E. 721, holding that the Massachusetts income tax is laid directly on the income of property and is in reality a tax on the property itself, and that, therefore, as a part of the income was received outside the jurisdiction of Massachusetts, it was not subject to taxation in Massachusetts. The Supreme Court of Massachusetts, however, stated that the Hart Case had to do with a tax laid upon income derived from property where the person to whom the income tax was assessed was not an inhabitant or domiciled in the commonwealth and where the person or property, or income from the property, was not within the jurisdiction of the commonwealth and where during the time with respect to which the tax was laid the court stated:

> "In the case at bar the complainant was an inhabitant and domiciled in the commonwealth from June 1st, until December 31st. of the year with respect to which the tax was assessed upon him and during his inhabitancy he received the income from his salary and the dividends and interest from his investments which were apportioned to that period of time. These provisions and those as to deductions are clearly intended to recover a return and an assessment of an entire income received during the entire year, the calendar year, prior to the assessment of the tax. There is nothing in the statute which gives countenance to, or is authority for the levy of an assessment on income which shall not be the entire income re-

ceived by an inhabitant in case such inhabitant becomes an inhabitant of the commonwealth during the year prior to the assessment."

In the case of *Kennedy v. Commissioner of Corporations*, 152 N. E. 747, the Supreme Court of Massachusetts limited the doctrine announced in the Anderson Case. In the Kennedy Case petitioner removed from Pennsylvania to Massachusetts on October 8, 1921, and in 1922 filed her return showing that part of her income was received while a resident of Pennsylvania and also her income received in Massachusetts, a tax was levied upon the entire income. Without passing on the constitutionality of the question involved, the court construed the statute to exclude income received from sources outside the state on the ground that where possible, the courts should construe a statute so as to prevent grave doubts of its unconstitutionality.

In the case of *People, ex rel Estate of Woolworth v. S. T. Commissioners*, 192 N. Y. S. 772; 200 App. Div. 287, involving the question of taxation of income received from foreign jurisdictions, the facts were: Frank W. Woolworth was a resident citizen of New York on January 1, 1919 and remained a resident until the time of his death on April 8, 1919. The income tax law of New York took effect January 1, 1919. The record did not show when Woolworth became a citizen of New York, but the court said that apparently it was of no importance. The act defined the word "resident" as applying only to natural persons and including for purposes of determining liability any person who should die at any time during the last six months of the calendar year. As before stated, Woolworth did not die during the last six

months of the year but on April 8th. The court defined the issue as follows:

> "The sole question raised is whether the relator is taxable as a resident or a non-risident. The effect of adopting relator's contention (that he was a non-resident) would be to exclude from the computation of his tax the amount of his income from sources without the state aggregating an additional tax plus interest of $9,064.67. The elimination of such income would produce a tax of $28.41."

In deciding the question the court said:

> "It is our interpretation that Mr. Woolworth was up to the time of his death a resident and subject to the complete jurisdiction of this state; that his entire income from all sources was subject to the taxing power of the state."

It is true that the constitutionality of the tax was not argued in the foregoing case, but the issues were so framed that the question would naturally have presented itself to the able attorneys appearing therein.

26 R. C. L. p. 144, Section 118 (Permanent Supplement Addition) discusses the question as follows:

> "As the income tax comes into more common use, interesting questions are liable to arise respecting the situs of income for the purpose of taxation. But at the present time the law upon this subject is not fully developed. As between different nations, it appears to be held that one nation

can tax the income of its own citizens from whatever territorial source derived; that it can even tax the income of one of its own citizens resident in a foreign country and deriving his income from property situated or business carried on in such country, while at the same time it can tax an alien resident or non-resident on income derived from property situated or business carried on within its terirtorial limits. * * * The same principles are applied in this country to corporations, a corporation being a citizen of the nation by the laws of which it was incorporated and domestic corporations being taxed on their entire net income, while foreign corporations doing business in this country are taxed on so much of their income as is derived from the local business carried on. * * * *

With regard to an income tax on domestic corporations, there would seem to be no constitutional difficulties in taxation by a state of the entire net income of a domestic corporation for its business operations wherever they may be carried on."

In the case of *Shaffer v. Carter*, 252 U. S. 37; 64 L. Ed. 445, the court has this to say regarding the taxation of its resident citizens:

"As to residents it may and does exert its taxing power over their income from all sources whether within or without the state, and it accords to them a corresponding privilege of deducting their losses wherever these accrue. As to non-residents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from

those sources. Hence, there is no obligation to accord to them a deduction by reason of losses elsewhere incurred."

The case of *Crescent Manufacturing Company v. Tax Commission*, S. C. 124 S. E. 761, decided by the South Carolina Court supports the appellee's contention. The manufacturing company in the above case contended that the laws of South Carolina did exempt domestic corporations from income tax calculated on net income derived from business operations outside of the state. The court held, however, that the income tax law of that state levied a tax upon the entire net income of a domestic corporation from whatever source derived. The court stated as follows:

"If this act is a state income tax law, as it purports to be, and if by virtue of Section 13 the tax is limited to net income derived from sources within the state, then the inevitable effect of the law in practical operation is to impose upon a certain class of the state's income earners or recipients more than their just and equitable share of the general burden of taxation. To illustrate, here are two residents and citizens of the City of Chester, South Carolina. Each has a net income of $15,000.00. One derives his income from farms and mercantile operations in the State of South Carolina, and the other derives his income from investments and land and from an interest in an insurance business conducted in the State of North Carolina. Both get the benefit of all that the government of the state through expenditures from the public treasury for schools, roads, police protection, and the social, and economic welfare of the people can furnish. Under the construction

of this act approved in the circuit decree the citizen who derives his income from his farms and mercantile business within the state in addition to paying into the treasury of the state a direct tax on his property real and personal, a municipal license tax on his mercantile business, and a tax on his income to the Federal Government, must pay to the state as a tax on his net income one-third of the amount paid as income tax to the United States, but the other citizen of Chester whose income is derived from sources outside the state and who gets practically as much out of the state in the benefits of Government as the other man would have to pay for the support of that government not one cent exclusive of his poll tax and perhaps a nominal street or road tax, etc. Between these two income earners or gatherers an intent on the part of the legislature to discriminate against and tax the citizen of the state who receives his income from sources and operations within the state and exempt the other is not to be readily implied. Why resort to an income tax at all, if the burden thereof is to be borne exclusively by the class of the state's citizen who already pay the property and business taxes of the state? That the construction of the act approved in the circuit decree which confines the application of the tax to income derived from operations and sources within the state would work a serious and unjust discrimination against that class of the state's citizens and tax payers whose income is derived from local sources in favor of that large class of the state's citizens, natural and corporate, whose income in whole or in part is derived from operations and sources outside of the state would seem to be sufficiently apparent."

The case of *Hans Rees Sons, Incorporated, v. State of North Carolina*, 283, U. S. 123 75 L. Ed. 879, does not decide that a state may not lawfully tax a resident or a domestic corporation on its entire net income regardless of the territorial source from which it may be derived. The facts in that case show that the State of North Carolina was undertaking to tax the income of a foreign corporation and to measure the tax by the entire net income of the corporation derived from business conducted throughout several states.

The authorities cited by the appellant do not support his contention that the tax is unconstitutional. In *Safe Deposit and Trust Company v. Virginia*, 280 U. S. 83; 74 L. Ed. 180, the tax was declared void because the authorities had no jurisdiction to levy a tax on the corpus of an estate over which it had no control; in *Farmers Loan and Trust Company, v. State of Minnesota*, the tax was declared void because the state had no jurisdiction either of the person or of the property which it was seeking to tax; in *Frick v. Commonwealth* the State of Pennsylvania imposed an inheritance tax measured by the actual value of lands situated in another state which was the same as imposing a direct tax on the land; the case of *Rees Sons, Incorporated*, as above stated, is not in point because the state was taxing the net profits of a foreign corporation, the greater part of which was derived from sources outside the state.

The case of *Fidelity Trust Company v. Louisville*, 245 U. S. 54, 62 L. Ed. 145 permitting the imposition of a personal tax by the State of Kentucky measured by money received from a business conducted in another state and kept on deposit there directly supports appellee's contention, and

that this contention is further upheld in *McGuire v. Trefry*, 253 U. S. 12; 40 Sup. Ct. 417; 64 L. Ed. 739; *Shaffer v. Carter*, 252 U. S. 37; 40 Sup. Ct. 221; 64 L. Ed. 445; *Woolworth Estate v. Tax Commission*, 192 N. Y. S. 772; 200 App. Div 287, and *Crescent Manufacturing Company v. Tax Commission*, 129 S. C. 480; 124 S. E. 761.

Appellee further maintains that the doctrine of *mobilia sequuntur personam* is not decisive of the constitutional question here involved because the Supreme Court of the United States has repeatedly declared that the constitutionality of a tax must be determined by its effect rather than by some arbitarary definition or legal fiction. Thus in the McGuire case if the effect of the tax was to tax property in Pennsylvania, then the court would not have permitted a violation of the Fourteenth Amendment under the guise of a property tax on a theoretical situs of property. Again in the Louisville Case, the court permitted the imposition of a personal tax measured by certain bank accounts situated in another state, thereby eliminating the doctrine of *mobilia sequuntur personam*.

In the present case appellant admits by implication that if the Mississippi income tax was a property tax and if the $50,000.00 earned by Mr. Lawrence was on deposit in a Tennessee bank or was invested in a bond kept in a safe deposit vault there, it would be taxable in Mississippi, yet he argues that the same $50,000.00, if taxed by an excise tax, would violate the Fourteenth Amendment. In either case the income would be earned in Tennessee, and the tax, omitting all technical definitions and legal fictions, would be a tax imposed by Mississippi on the income received by

Mr. Lawrence in Tennessee. As stated above in the Louisville case, the Kentucky tax was construed to be a personal tax measured by a bank account in another state. The situs of the property therefore, was not involved. It is true that in the McGuire and the Safe Deposit Bank cases the doctrine of *mobilia sequuntur personam* was applied because the courts had construed the taxes to be property taxes, but it does not follow that an excise tax levied under like circumstances would be unconstitutional. It seems that the difficulty in those cases lay in the very fact that since the tax had been declared a property tax it was necessary to bring the property within the jurisdiction of the state.

Chapter 132, Laws of 1924 and amendments thereto imposes an income tax, which our court has held to be in the nature of an excise tax but partaking in many respects of the attributes of a real and personal tax. In discussing the contention made in the Hattiesburg Grocery Company case and the G. M. & N. R. R. Company case that a tax levied on income derived from property was a tax on the property itself the court remarked that there could be no income derived from property without some activity on the part of the owner, and that the Laws of 1924 placed a tax upon the net income accruing to the owner as a result of such activities. Using this reasoning as a predicate, appellant argues that before an income tax is collectible, the tax payer must have done some act resulting in a profit, and that the act must have been performed in this state; otherwise the Fourteenth Amendment is violated. This is placing too broad an interpretation on the language of the court, for it is entirely permissible for the state to tax the increment of property, the interest on bonds, dividends on

stocks, and even gifts, all of which result in gain to the taxpayer without any act on his part. If the court should adopt appellant's contention, it will be a very easy matter for men of wealth to escape taxation on income received from intangible personal property. For illustration, a resident citizen of Mississippi goes to New Orleans and purchases first mortgage six per cent bonds in the sum of $100,000.00, secured by real estate in Texas, which he places in a safe deposit box in the New Orleans bank. By his direction, the interest payments are placed to his account in the same bank. The Mississippi citizen has performed one single act in this state and that was to leave it. His rights are determined by the laws of other jurisdictions. Texas must determine his right in and to the lands securing his bond and enforce the provisions of the mortgage. His contract of purchase is determined by Louisiana, the state in which the contract was made and executed, and his possessory rights are determined by the same laws. The Mississippi citizen receives $6,000.00 a year from his investment and yet under appellant's theory he could not be assessed with an income tax in this state. It will not do to say that for some purposes the doctrine of *mobilia sequuntur personam* would apply because our law imposes an excise tax and jurisdiction of the *res* is immaterial. We cannot believe that the court will adopt a theory leading to such unjust results and practically inviting an invasion of our tax laws.

If further citation of authority is necessary to substantiate the appellee's contention that the State of Mississippi has authority to impose an income tax on a resident individual measured by his net profit from all sources, we

call attention to the case of *Royster Guano Company v. Virginia*, 253 U. S. 412; 64 L. Ed. 989. In that case the State of Virginia undertook to tax domestic corporations on net income received from sources both within and without the state and to exempt certain other domestic corporations from taxation where no business was conducted within the state, except the holding of certain meetings. The court held that this was an unlawful discrimination. The case seems to be authority for the following propositions: (1) A state may impose an income tax on the net profits of a domestic corporation derived from sources within and without the state. (2) A state may impose a tax on the net income of a domestic corporation earned wholly without the state.

These conclusions necessarily follow because if the State of Virginia was without authority to impose an income tax on income earned wholly or partly in another state, the question of exemption was immaterial. If a state is without power to impose a tax on the income of a domestic corporation derived outside of the state, the above case places the Supreme Court of the United States in the position of saying that an exemption was discriminatory and unjust when the state in the first instance did not have the power to levy the tax which it sought to exempt. The plea of discrimination necessarily implies an admission of the validity of the tax on which the exemption is based.

(c) *"Since the occupation carried on wholly beyond the limits of the State may not be taxed at the source, the income arising therefrom is not, consistent with the Four-*

teenth Amendment to the Constitution of the United States, subject to taxation."

To sustain this contention, plaintiff relies on the *National Life Insurance Company vs. United States*, 277 U. S. 508; 72 L. Ed. 968, and *Miller vs. Milwaukee*, 272 U. S. 713; 71 L. Ed. 487. The doctrine of these cases is that to directly tax the income from securities amounts to taxation of the securities themselves; that State and Federal bonds are exempt from taxation and the interest thereon is exempt from taxation.

He further relies on the cases of *Gillespie vs. Oklahoma*, 256 U. S. 501, 66 L. Ed. 338, and *Indian Territory Illuminating Oil Co. vs. Oklahoma*, 242 U. S. 522, 60 L. Ed. 779. These cases involved the right to tax the income from oil and gas leases of Indian lands. The Court held that these were instrumentalities of the United States Government and not subject to taxation.

The question involved in this case is whether or not the income of a resident citizen of the State may be taxed by this State even though it is earned outside the limits of the State, and I submit that the following cases sustain the contention that such income may be taxed.

Kirkland vs. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558. The Court held as follows:

> "Plainly, therefore, our only duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident

of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall. 320 (82 U. S., XXI 187). It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the Government whose protection he enjoys.

"The debt in question although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor."

In the case of *U. S. Glue Co. vs. Oak Creek*, 247 U. S. 321; 62 L. Ed. 1135, the Court stated the case as follows:

"Plaintiff was and is a corporation organized under the laws of the state of Wisconsin, having its principal office and place of business in the town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the state, and in other states and foreign countries. Its net 'business income' in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about $124,000, derived from the following sources: (a)

About $16,000 from goods sold to customers within the state and delivered from its factory; (b) about $65,000 from goods sold to customers outside of the state and delivered from its factory; (c) about $31,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches in other states, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about $7,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches without the state, these goods having been purchased by plaintiff outside of the state and shipped to plaintiff's factory in the state, and thence shipped before sale from the factory to the branches; (e) about $5,000 from goods sold outside of the state, the sales having been made and goods shipped from the points of purchase to the branches without coming into the the state of Wisconsin.

"No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the state was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the supreme court, that items (b) and (c) were not taxable because derived from interstate commerce."

The statute here in controversy provided "that any person engaged in business within and without the State shall * * * * be taxed only on that portion of such income as is derived from business transacted and property located within the State."

The Court held as follows:

"And so we hold that the Wisconsin Income Tax Law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business."

In *MaGuire vs. Trefry*, 253 U. S. 12; 64 L. Ed. 739, this Court held as follows:

"In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the state to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another state.

"In *Fidelity & C. Trust Co. v. Louisville*, 245 U. S. 54; 62 L. Ed. 145; L. R. A. 1918C 124; 38 Sup. Ct. Rep. 40, we held that a bank deposit of a resident of Kentucky in the bank of another state, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co. v. Kentucky*, supra, was distinguished, and the principle was affirmed that the state of the owner's domicil

might tax the credits of a resident, although evidenced by debts due from residents of another state. This is the general rule recognized in the maxim 'mobilia sequuntur personam,' and justifying except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicil of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application, and may yield to the exigencies of particular situations. But we think it is applicable here.

"It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property, in view of the law, but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others.' 2 Story, Eq. 11th ed. Sec. 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

"The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state, which are held taxable at the domicil of the own-

er. *Kirtland vs. Hotchkiss,* 100 U. S. 491, 25 L. Ed. 558."

Safe Deposit & Trust Company of Baltimore vs. Commonweath of Virginia, 280 U. S. 83, 74 L. Ed. 180. In this case the Court was careful to distinguish the facts of this case from the facts in other cases mentioned in the opinion. The Court stated that the question involved in this case was as follows:

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State. We think Not."

The Court distinguished the facts in this case from the facts in other cases as follows:

> "No opinion of this court seems definitely to rule the exact point now presented. *Blackstone v. Miller,* 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277, sustained an assessment of tax by New York under the transfer of credits declared to have taxable situs within her borders, under the will of a citizen of Illinois. In *Wheeler v. Sohmer,* 233 U. S. 434, 57 L. ed. 1030, 34 Sup. Ct. Rep. 607, the tax was not laid at the owner's domicile, but by the state wherein the securities were deposited. *Bullen v. Wisconsin,* 240 U. S. 625, 60 L. Ed. 830, 36 Sup. Ct. Rep. 473, involved an inheritance tax; the creator of the trust resided in Wisconsin at his death and an Illinois company with legal title then held possession of the property in Chi-

cago; but the creator had retained full power to revoke the trust and regain control. *Fidelity & C. Trust Co. v. Louisville*, 245 U. S. 54, 62 L. ed. 145, L. R. A. 1918C, 124, 38 Sup. Ct. Rep. 40, sustained a tax laid at the domicile of the legal owner. He had full power to control the deposits in St. Louis banks and might have brought the entire fund within Kentucky's jurisdiction. In *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. Rep. 410, the decedent—a resident of Connecticut—had control and present right to all benefits arising from the property. The legal title was not held by another with the duty to retain possession, as in the present cause. Moreover, this court did not there determine that the property had a taxable situs in New York."

I, therefore, most respectfully submit that these cases fully sustain the holding of the Supreme Court of the State of Mississippi in the case of *Knox vs. G. M. & N. R. R. Co.*, 138 Miss. 70, and they also fully sustain the contention that the income of Mr. Lawrence, a resident of Mississippi, earned in Tennessee, was subject to the income tax levied by said Chapter 132, Laws of 1924 and amendments thereto.

(d) *"The income earned and the property with which same was earned subject to taxation in Tennessee."*

Under this heading, counsel for appellant cites the 1927 Acts of Tennessee Legislature, imposing a privilege tax upon contractors. There is no showing in the record that the appellant was liable for this tax or that he paid this tax, or that he had any property whatever in the State of Tennessee, or that he paid any taxes in said State.

The appellant was under the protection of the Laws of the State of Mississippi, his estate was under the protection of the laws of Mississippi, and the income earned by him in the State of Tennessee was under the protection of the laws of the State of Mississippi.

This Court held in the case of *Maguire vs. Trefry*, 253 U. S. 12, 64 L. Ed. 738, as follows:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and freedom, and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. *It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference.*"

POINT II

"No liability is imposed on domestic corporations engaging in competition with appellant, for construction of highways in Mississippi and adjoining states, including Tennessee, under similar circumstances."

(a) The state may levy an excise on income earned beyond the confines of the state by resident citizens of the state and not levy such a tax against the income of domestic corporations.

Section 11, chapter 132, Laws of 1924 as amended by chapter 32, Extra Session 1928, provides as follows:

"(b) The term, gross income does not include the following items which shall be exempt from taxation under this act."

"(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid, or is liable by assessment to pay, a tax pursuant to this act."

"(11) Income of a domestic corporation when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising."

Under this provision a domestic corporation is not required to pay the income tax on income earned beyond the borders of the state, however, the resident stockholders of such domestic corporations are required to pay income tax on the dividends received from such corporations.

A domestic corporation which earns its income within the state, pays the income tax thereon. The stockholder in such corporation does not pay a tax on the dividends received from the corporation.

In the instant case, Lawrence, an individual, had contracts in Alabama, Mississippi and Tennessee. The Missis-

sippi statute required him to pay an income tax on the net income received from all of such contracts, whether the income was earned in Mississippi or out of Mississippi. He was likewise permitted to deduct from his income losses sustained by his operations in either of such states; that is, if he had a loss in Mississippi, and a profit outside of Mississippi, his losses would be deducted from his profits.

A domestic corporation is required to pay the taxes on the income earned in Mississippi. It is not required to pay a tax on income earned outside of the state, and it is not permitted to deduct losses on operations outside of the state.

In the case of *Franklin v. Carter*, Tenth Circuit, 51 Fed. (2nd) 345, the court stated the facts as follows:

> "The petition alleged that appellant was a resident of Oklahoma engaged in the production and sale of oil and gas in competition with corporations doing a like business in that state; that sections 9934 to 9945, inclusive, C. O. S. 1921, purport to impose a tax upon his income and to exempt the income of corporations from such tax; that such exemption is discriminatory and deprives him of due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution. The trial court sustained a demurrer to the petition."

The court holds as follows:

> "(7) The question here is whether the

classification in the instant case rests upon a substantial difference and bears a reasonable relation to the object of the legislation. This precise question was considered in *Conner v. State*, 82 N. H. 126, 130 A. 357, and the court held the New Hampshire statute valid on the ground that avoidance of double taxation was a sufficient basis for such classification.

A general income tax law imposing a tax alike on corporations and natural persons will result in double taxation of the earnings of corporations paid as dividends, unless some method is devised to exempt either the corporation or its stockholders from the tax on such earnings. In framing the income tax law in question, the Oklahoma legislature undertook to avoid the injustice of taxing both the corporation and its shareholders on the earnings paid as dividends, by providing that the shareholders should pay taxes on such earnings when received by them in the form of dividends, and, exempting the corporation from tax.

A tax laid upon only the earnings of a corporation when paid to its stockholders as dividends results ultimately in a tax on a substantial portion of such earnings and avoids double taxation thereon.

It is our opinion that there is a substantial difference between corporations and natural persons for income tax purposes because, ordinarily a large portion of the earnings of a corporation are paid to its stockholders as dividends and are income of both the corporations and such stockholders; that it affords a rational basis for the classification provided by the statute here in question; that such classification rests on a difference

having a fair and substantial relation to the object of the legislation; and that it results in like treatment to all persons similarly situated.

It follows that the statute does not violate the equal protection clause of the federal constitution."

Petition for writ of certiorari was denied by the court.

See *Franklin v. Carter*, No. 394, 75 L. Ed. 55.

In the case of *Iowa, Des Moines National Bank v. E. R. Bennett*, Nos. 15 and 16, cited by counsel for appellant. This court was construing the Federal statute providing that a state might tax the stock holders in a National bank in a certain way. The case had no reference to a constitutional provision and is not authority for contention of appellant herein.

Counsel for appellant in support of the proposition raised under Point 11 of their brief, cite *Frost v. Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483, which case, I submit, has no application to the proposition here involved. That case decides:

"That by the statutes of Oklahoma cotton gins operated for the ginning of seed cotton for the public for profit are declared to be public utilities in a public business, and no one may engage in the business without first securing a permit from a public commission, which is empowered to regulate the business and its rates and charges, as in the case of Transportation and Transmission Companies, *Held*: That the right of one who has com-

plied with the statutes and secured his permit is not a mere license, but a franchise granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment.

While the franchise thus acquired does not preclude the state from making similar valid grants to others, it is exclusive against attempts to operate a competing gin without a permit, or under a void permit, in either of which event the owner may resort to a court of equity to restrain the illegal operation as an invasion of his property rights, if it threaten an impairment of his business.

That an individual who obtained his permit to operate a cotton gin upon showing a public necessity therefor as required by the statute, is entitled to an injunction restraining the State Commission from granting a permit to a corporation without such a showing under a separable provision of the statute violating the equal protection clause of the Fourteenth Amendment.

That a state statute regulating the business of ginning cotton for the public for profit, which permits an individual to engage in such business only upon his first showing a public necessity therefor, but allows a corporation to engage in the same business in the same locality, without such a showing, discriminates against the individual in violation of the equal protection clause; that the classification attempted in the case shown is essentially arbitrary because based upon no real or substantial differences reasonably related to the subject of the legislation.

That a co-operative ginning corporation formed under Oklahoma Compiled Statutes, 1921, Section 5637, et seq., having a capital stock, which is up to a certain amount, may be subscribed for by anyone; which is allowed to do business for others than to members, and to make profits and declare dividends not exceeding eight per cent per annum, and to apportion the remainder of its earnings among its members ratable upon the amount of production sold by them to the corporation, is not a mutual association. That a proviso added to an existing statutory provision by a subsequent legislature, and the effect of which if it were part of the original enactment would be to render the whole unconstitutional, may be treated as a separate nullity, allowing the original to stand.

That in such case one who sought and obtained property rights under the original and valid part of the statute, is not estopped from attacking the proviso."

Justices Holmes, Brandeis and Stone dissenting.

None of the cases cited in the Frost case, supra, have any more bearing or application to the case at bar than the principal case itself. The cases so cited are:

Arkansas Natural Gas Company v. Arkansas Railroad Commission, 261 U. S. 379;

Louisville Gas and Electric Company v. Coleman, 277 U. S. 32;

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389;

Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U. S. 544;

Gulf Sea and S. F. Railway Company v. Ellis, 165 U. S. 150;

Royster Guano Company v. Virginia, 253 U. S. 412;

Airway Electrical Appliance Corporation v. Day, 266 U. S. 71;

Schlesinger v. Wisconsin, 270 U. S. 230.

Appellant also cites *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, which holds in effect that:

"A law of Pennsylvania (Pa. L 1889, 420, 431; Pa. St. 1920, Section 20, 388), provides that a tax be laid on the gross receipts derived from foreign or domestic corporations from their operation of cabs in intrastate transportation of passengers, but does not tax the like receipts of individuals and partnerships in the same kind of business is in violation of the equal protection clause of Fourteenth Amendment which extends to foreign corporations within the jurisdiction of the state, and safe-guards to them the protection of the laws which are to be applied equally to all in the same situation.

That the equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, but that it does not require the classification to be not arbitrary but based on a real and substantial difference having

a reasonable relation to the subject of the particular legislation."

The cases cited in the principal case of the *Quaker City Cab Company v. Pennsylvania* are: *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U. S. 544; and *Power Manufacturing Company v. Saunders*, 274, U. S. 490.

Appellant also cites *Southern Railway Company v. Greene*, 216 U. S. 400, which holds, among other things, that:

"Equal protection of the laws means subjection to equal laws applying alike to all in the same situation. That a corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment.

That a corporation which comes into a state other than that in which it is created, pays taxes thereto and acquires property and carries on business therein, is within the jurisdiction of that state, and, under the Fourteenth Amendment, entitled to protection against any statute of that state that denies to it the equal protection of laws.

The arbitrary selection cannot be justified by calling a classification in the absence of real distinction on a substantial basis; and that a classification for taxation that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary, and a denial of the equal protection of the laws."

The appellant also cites *Royster Guano Company v. Virginia*, 253 U S. 412, which holds that:

> "A state law which taxes all the income of local corporations derived from business done outside of the state and business done within it, while entirely exempting the income derived from outside the state by local corporations which do no local business, is arbitrary and violates the equal protection clause of the Fourteenth Amendment.

The cases cited in this last mentioned principal case as authority for the holding therein are the following:

Bell's Gap Railway Company v. Pennsylvania, 134 U. S. 245;

Michigan Central Railroad Company v. Powes, 201 U. S. 245;

Keeney v. New York, 222 U. S. 525;

Citizens Telephone Company v. Fuller, 229 U. S. 322; and *Northwestern Mutual Life Insurance Company v. Wisconsin*, 247 U. S. 132.

Appellant also cites the case of *Chalker v. Railroad Company*, 249 U. S. 522, which holds that;

> "A state law making the amount of annual tax for the privilege of doing railroad construction work depend on whether the person taxed has his chief offices in the state, viz., $25.00 if he has and $100.00 if he has not—discriminate against citizens of other states in violation of Article IV, Section 2 of the Constitution.
>
> That a citizen of another state who would be

liable for the larger tax, if valid, may question its validity without first tendering the lower tax."

Cases cited by the court in the Chalker case, supra, are:

Ward v. Maryland, 12 Wall. 418;

Guy v. Baltimore, 100 U. S. 434;

Blake v. McClung, 172 U. S. 239; and *I. M. Darnell & Son Company v. Memphis*, 208 U. S. 113."

None of the decisions thus summarized have any application to or bearing upon the proposition advanced under this point in counsels' brief for the reason that our statute is easily and clearly differentiated from any of the statutes discussed or any of the holdings by the Supreme Court of the United States in any of the above mentioned cases.

Replying to the charge of discrimination presented by the argument of the counsel in their brief under Point II. I cite the following: *First National Bank v. Board of Supervisors of Harrison County*, 157 Miss. 197, 127 So. 686, where the taxing authorities adopted a system of lowering the assessment and increasing the rate of taxation for the purposes of evading the state tax levy and for other reasons, and had resulted in adopting as a system of values, or as a true value, a rate which equalled sixty-five cents on the dollar of the true value, and at this rate all assessment of all other property, except that of the banks, were made and approved by the Board of Supervisors, and that, notwithstanding its adoption with reference to everyone else, the Board required a strict construction of the law with reference to the assessment of banks, so that, in fact, the banks were required to pay at a rate of thirty-five per cent in ex-

cess of the rate of assessment required on the same valuation owned by any persons other than the banks. This court on appeal of the case by the bank, from a judgment sustaining a demurrer to its petition in which the foregoing facts, among others, were set forth, said there were two questions for decision:

> "First under Section 112 of the Constitution of the State of Mississippi, is there a requirement that all property assessed for taxes in the State of Mississippi, irrespective of its type, situation, and classification, be assessed for the purpose of taxation at its true value;
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> "Second, if such is the requirement of said Section 112 of the Mississippi Constitution, that is, that all property shall be assessed at its true value, is it a denial of the equal protection of the law guaranteed by the Fourteenth Amendment when the property of the banks alone of all the property situated in a county is assessed at its actual or one hundred per cent value when for many years past and at that particular time of the assessment complained of, all of the property was deliberately and intentionally assessed at sixty-five percent of its value;"

The court in answer to the foregoing propounded questions held that:

> "Upon facts and pleadings practically identical with those appearing in the record of the case at bar, this Court in the case of *Magnolia Bank v. Pike County*, 111 Miss. 857, 76 So. 697, 3 A. L. R. 1365, expressly decided each of the questions now presented, and counsel for the appellant concedes

in his brief that unless the Magnolia Bank case is overruled, this case must be affirmed, and, in an effort to have us overrule that case, counsel has presented a very able and exhaustive brief and argument. The doctrine announced in the Magnolia case has been accepted and acted upon by the banks and taxing authorities of this state for more than thirteen years, and, while we have carefully considered the questions presented in the light of the authorities cited by counsel, we are unwilling to overrule the case. In all respects the case at bar is ruled by the Magnolia Bank case, and consequently the judgment of the court will be affirmed."

In *Magnolia Bank v. Board of Supervisors*, 111 Miss. 857, cited, approved and followed in the next above cited case, in which the facts are practically identical, this Court held that:

"There is no merit in the contention that a denial of the relief sought would in anywise violate the Fourteenth Amendment of the Federal Constitution, guaranteeing due process of law and equal protection of the laws. Each state has a sovereign right to classify property for purposes of assessment and taxation, and so long as property of the same class bears the same rate, or to state differently, so long as there is no discrimination between property of the same class, there is no violation of these provisions of our Federal Constitution. *Michigan Central Railroad Company v. Powers*, 201 U. S. 300, 26 Sup. Ct. 459, 50 L. Ed. 764, and authorities there mentioned. By paying the full tax for which appellant is assessed in this case, it will pay only what the Supreme

> Court of the land has exacted. It will simply be rendering 'Unto Caesar the things that are Caesar's'."

Many other cases to the like purport might be cited, but it is unnecessary to do so since the case of the *Bank v. Supervisors of Harrison County*, supra. appears to be the latest pronouncement of the law by this court.

It is true that the tax out of which the present controversy has developed is not *ad valorem* or property tax, but is an excise tax, therefore, Section 112, of the State Constitution is not directly involved. *Hattiesburg Grocery Company v. Robertson*, 126 Miss. 34; *Knox, Attorney General, v. G. M. & N. Railroad Company*, 138 Miss. 70.

Concerning the exemption of domestic corporations, as contained in sub-section 11 of the act, reference is specifically directed to the case of *Knox, Attorney General v. G. M. & N. Railroad Company*, supra, where, at page 105 of the report, this Court said:

> "The power of the state to confer exemptions from taxation of this character is settled by a long line of decisions extending from *Mississippi Mills v. Cook*, 56 Miss. 63, to *City of Jackson v. Mississippi Fire Insurance Company*, 132 Miss. 415, 95 So. 845. Moreover, if this exemption should have been void, it may be stricken from the act without affecting the remainder thereof. *Adams v. Standard Oil Company*, 97 Miss. 879, 53 So. 692.
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> "An income tax as hereinafter pointed out is

an excise and not a property tax.

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"As to the extra territorial effect of the act, the tax imposed on residents of the state and on domestic corporations is on the whole of their income, whether derived from business within or without the state, and the contention is that the tax is void in so far as it covers income derived from business without the state. The question here presented was ruled against the appellees by the Supreme Court of the United States in *Maguire v. Trefry*, 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739, and *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445."

See also 107 *So.* 563.

It is true that subsection 11, Section 11, Chapter 132, Laws of 1924, as amended by Chapter 32, Laws Extra Sess. 1928, formed no part of the statute at the time the next above cited case was decided, but all the principles stated thereing apply with force to the statute as so amended.

It remains now only to make a careful examination of Section 11, Sub-sections 8 and 11 thereof of the statute (Chapter 32, Laws Extra Sess. 1928), after consideration of the reasoning of counsel for the appellant, as reflected in and by their brief herein. Counsel for appellant assume that under the provisions of Chapter 32, Laws Extra Sess. 1928 (Amended Section 11, Chapter 132, Laws of 1924; Section 5033, Code of 1930), the appellant under the facts stated, if he had been a domestic corporation, would have been exempted from and escaped payment of the tax by virtue of the provisions of Sub-section 11 of the statute. In

this regard, I submit that they misconceive and misapply the law. Manifestly then have reasoned thus: "Mr. Lawrence, a resident citizen of Mississippi, made contracts to construct certain parts of highways in the State of Tennessee. In the performance of those contracts he was fortunate and cleared a profit in excess of $50,000.00. This net income he, of course, brought into the State of Mississippi, either actually or by operation of the maxim that movables follow the person of the owner. The state demanded that he pay income tax on this sum." But, they insist that had Mr. Lawrence incorporated under the laws of this state, then, as a domestic corporation, no matter if he had held and owned ninety-nine per cent of the capital stock of the corporation, such corporation might and could have made the identical highway contracts in Tennessee, performed their terms, made the same profit, and, under the provision of sub-section 11 of Chapter 32, Laws Extra Sess. 1928, such income would be exempt. Therefore, they further reason, the law discriminates in favor of domestic corporations against individuals, in cases where the income is derived from identical sources and under the self-same conditions. Wherefore, the appellant contends that the statute, as it now appears in the code violates both the Federal and State Constitutions (Section 14, State, and Fourteenth Amendment to the Federal Constitutions), and ask this court to so declare it.

Now the statute provides:

> "(B) The term 'gross income' does not include the following items, which shall be exempt from taxation under this act:

"(8) Income received during the taxable year as dividends from a corporation on which such corporations has already paid, or is liable by assessment to pay, a tax pursuant to this act.

"(11) Income from a domestic corporation, when earned from sources without this state."

Let it therefore be assumed that Mr. Lawrence, before making and entering upon the performance of the contracts for the construction of the highways in Tennessee, together with an associate or associates, had applied for and received a charter of incorporation under the laws of the State of Mississippi, such corporation, a domestic corporation, by the terms of sub-section 11, would not be liable, as a corporation, for the tax on the income earned by it from sources ouside of the state. However, this income, or the net profit, earned by such a corporation from sources without the state, must naturally be divided among the share holders, free of income tax. The money thus becomes the property of individual share holders. If, then, Mr. Lawrence owned, and held, ninety-nine per cent of the capital stock of the corporation, and the profit in round numbers amounted to $50,000.00, he would be liable for the tax on $49,450 thereof, and the other holder of one per cent of the stock for the tax on $550.00. Because, sub-section 8 of the act exempts income received as dividends from a corporation only when such corporation has already paid, or is liable to pay, a tax pursuant to the provisions of the act. Now the corporation, as such, would not have paid, nor could it be liable by assessment to pay, the tax on the income pursuant to the provisions of the act. To the contrary, it is expressly exempted, as a domestic corporation, from liability to taxation

on its income earned without the state. But when the income so earned is divided amongst the share holders, then each individual share holder is, under the provisions of sub-section 8, liable for his pro rata. No tax on the whole having been paid by the corporation, the dividends do not fall within the category of those exempted by sub-section 8.

This court will not strike down a statute, or any part thereof, if it can possibly be construed as to render it constitutional. *Wheatley v. State,* 113 Miss. 555.

In *State, ex rel v. Gilmer Grocery Company,* 156 Miss. 99, the court in responding to the very proposition advanced by the appellant in the instant case by Point II of counsels' brief, said:

> "Our own court is committed to the proposition that a statute should be so construed as to render it constitutional, if possible, and a statute will not be declared invalid unless it is clearly apparent that it conflicts with the organic law after resolving all doubts in favor of its validity. See *Richard v. City Lumber Company,* 101 Miss. 678, 57 So. 977; *University of Mississippi v. Waugh* 105 Miss. 623, 62 So. 827, L. R. A. 1915 D, 588, Ann. Cas. 1916E, 522; *Miller v. State,* 130 Miss. 564, 94 So. 706.
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> "In the case of *Rast, Tax Collector, v. Van Deman,* 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455 the Supreme Court of the Land said:
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> " 'It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that it sustains it, and the

existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 61. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

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"'It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare'."

In *L. H. Conrad Furniture Company v. State Tax Commission*, 160 Miss. 185, 133 So. 652, this court held that:

"In construing a statute of doubtful meaning the consequences of any particular construction should be considered, whether they be good or bad. If appellant's construction of the statute here involved should be adopted, at least two harmful results would follow—namely (1), the state would probably be deprived of a considerable amount of revenues," etc.,

* * * * * * * * * * * * * *

"We are unwilling to put any such construction upon a statute, unless we are forced to do so by its unmistakable and imperative terms. We do not think this is such a statute."

In *Wheatley v. State*, 113 Miss. 555, 74 So. 427, decided by this court en banc, the Chief Justice dissenting, it is held that:

"If there are two different interpretations of

a statute, one of which would render the act constitutional, and the other unconstitutional, it is elementary that we should adopt that view and construction which would harmonize the act with the constitution, and which would therefore uphold and not strike down the work of our law makers. It is our understanding that the interpretation which we here place upon the statute is the interpretation which the Board of State Commissioners, themselves, placed upon these provisions of the statute. While the construction of the State Board would not be binding upon this court, it yet remains that the construction which a department of government has placed upon the very law under which it was created and which it is sworn to enforce should be both suggestive and persuasive with the courts."

To the same effect are the following:

Miller v. State, ex rel, Russell, 130 Miss. 564;

Hinds County v. Johnson, 133 Miss. 591;

Staple Cotton Co-operative Association v. Hemphill, 142 Miss. 298;

Robinson v. State, 143 Miss. 709;

Thompson v. Box, 147 Miss. 1, 112 So. 597;

State v. Miller, 144 Miss. 614, 109 So. 900.

(b) *In the event this court holds that the levy of an income tax earned by individuals outside of the State which is not levied on domestic corporations under the same circumstances the provision of the Constitution of the United States, then the amendment of Section* 11, *Chapter* 132.

Laws of 1924, *by Chapter* 32, *Extraordinary Session of* 1928, *must be stricken down and the original statute be permitted to stand.*

Under the provisions of Section 11, Chapter 132, Laws of 1924, the income of individuals and the income of domestic corporations were taxed exactly in the same manner. Under the provisions of the amendment as made by Chapter 32, Laws Extraordinary Session of 1928, they are taxed as heretofore set out under subdivision (a) of Point II. In the instant case, record page 22, the Supreme Court of this State holds as follows:

> "If the Chapter 32 of Laws of State of Mississippi, Extraordinary Session 1928, is constitutional, of course the appellant is subject to the tax; if such act is unconstitutional, then Section 11 of Chapter 132, Laws of 1924, would remain in force as though the amendment had not been made, and under the said chapter both individuals and domestic corporations would be subject to income tax on the income earned outside of the state as well as income earned within the state. *State v. G. M. & N. R. R. Co.*, 138 Miss. 70, 104 So. 689, and authorities therein cited. It is, therefore, unnecessary to decide whether Chapter 32, Laws (fol. 32) of Mississippi, Extraordinary Session 1928, is constitutional or not, because from either viewpoint the same conclusion and judgment would be reached—that is to say—in taking either view the appellant would be liable for the tax. See *Miller, Tax Collector, vs. C. & G. Ry. Co.*, 154 Miss., 317, 122 So., 366, at page 324 of the Mississippi Report where the court said:
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> " 'In event a railroad discriminated against

by this statute should challenge the validity thereof on the ground that it is arbitrarily discriminated against, it would not be necessary for the court to decide the question, for so to do would profit the complaining railroad nothing; for, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complainant railroad's tax would be three hundred fifty dollars per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow'.

"See also *Moore v. Tunica County*, 143 Miss. 821, 107 So. 659; *Claiborne County v. Moorehead*, 145 Miss. 867, 111 So., 372; *Buford v. State*, 146 Miss., 66, 111 So. 850; *Miller v. Tucker*, 142 Miss. 146; 105 So. 774; *Pearl River County v. Lacy Lumber Company*, 124 Miss. 85, 86 So. 755; *Adams v. Standard Oil Co. of Kt.*, 97 Miss. 879, 53 So. 602; *American Express Co. v. Beer*, 107 Miss., 528, 65 So. 575, L. R. A. 1918E 446, Ann. Cas. 1916D 127."

In the case of *Adams v. Standard Oil Company*, 97 Miss. 879, the record shows that the Legislature of this State enacted statutes levying a privilege tax upon certain trades, callings and occupations; that it exempted therefrom persons over the age of sixty-five years with an income of less than $600.00, and certain disabled and maimed persons. Confederate soldiers were also exempt from the payment of said privilege tax. The question of the constitutionality of this statute was assailed in said case, the Standard Oil Company contending that because the Confederate veterans were exempt from the payment of said privilege tax the statute was unconstitutional. However, the Court held as follows:

"Our judgment is, from a consideration of the privilege tax statutes themselves, in connection with the long-established policy of the state of raising such a large proportion of its revenues in this manner, that the unconstitutional provisions of such laws may be stricken out, and there is left a complete and consistent scheme, which the legislature would have passed alone, the terms of which include Confederate soldiers, and make them liable for the peddler's tax, along with the Standard Oil Company, and all others engaged in the business."

In the case of *Smith, Tax Collector, vs. Perkins,* 112 Miss. 870, the facts are stated as follows:

"Chapter 90 of the Laws of 1916, requires the payment of a privilege license by 'each dealer in coffins * * * in all cities, if dealer be an undertaker, one hundred dollars. If any dealer in coffins * * * is an embalmer, or employs an embalmer in connection with his business, in that event, he shall pay an additional tax of ten dollars. None of the foregoing provisions shall apply to a merchant who carries coffins in stock and pays a privilege tax on the stock. But each merchant who carries coffins in stock and pays a privilege on the stock shall pay a tax of five dollars in addition to the tax required of him as a merchant'."

The Court held as follows:

"It will be noted that appellee is a merchant and carried coffins in stock, and has paid his privilege tax as a merchant and has also paid five

dollars in addition to the tax required of him as a merchant. He refuses to pay the one hundred dollars the statute assesses against undertakers, because he contends the statute exempts merchants from paying the undertaker's privilege tax, when the merchant pays the five dollars ad-additional required of him as a merchant.

"The business of an undertaker is a distinct business or profession. The undertaker takes charge of the corpse, prepares it for burial, and attends to its interment. If a merchant dealing in coffins as part of his stock may escape the undertaker's tax, it is easy to see that all undertakers could escape by supplying themselves with an insignificant stock of goods.

"It is difficult to imagine that the legislature intended to thus favor a selected class of merchants. If this is a proper construction of the statute, we find that an undertaker with a stock of coffins worth five hundred dollars would have to pay one hundred dollars, while a merchant with a stock of coffins worth one thousand dollars would get off with his undertaker's business by the payment of five dollars.

"We are unable to attribute this sort of discrimination to the lawmakers. To make this statute a valid exercise of the legislative power a different construction must be found, if it can be reasonably done. We believe that it was the intention of the legislature to require the payment of one hundred dollars by all undertakers, without reference to whether the undertaker also sells merchandise or not.

"It is generally understood that the undertaker's business is necessarily very profitable.

The bereaved relatives of the deceased cannot haggle about prices, and the undertaker's profits are only limited by his conscience, and no sane person can imagine that an undertaker's conscience would be satisfied by the accumulation of a stock of merchandise."

In *Johnson vs. Long Furniture Company*, 113 Miss. 373, the same facts and the same statute were under consideration by the Court as in the *Smith vs. Perkins* case, supra, and the Court reaffirmed its finding in said case.

These cases were decided on the theory that if a statute attempts to accomplish two or more objects and is void as to one, it may still stand as to the other, it appearing from the policy of the state that the Legislature would probably have enacted the balance of the statute without the exemption had it known that the same was invalid.

In the case at bar the Legislature had enacted a statute (Chapter 172, Laws of 1924), which appellant concedes to be constitutional. The amendment was made by Chapter 32, Laws Extraordinary Session of 1928, and if the amendment does contravene the provision of the constitution, then the amendment will be stricken down and the original statute be permitted to stand.

The case at bar is exactly on all-fours with the case of *Buford vs. State*, 146 Miss. 66.

Section 5, Chapter 189, Laws of 1918, prohibited the sale of intoxicating liquor and fixed the punishment therefor. Section 2 of Chapter 210, Laws of 1924, amended the

statute of 1918 so as to provide additional punishment in cases of conviction. The Supreme Court in the Buford case held that the amendment was void and, therefore, the original statute was the law of the land.

I, therefore, most respectfully submit that the judgment of the Supreme Court of the State of Mississippi should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.